Filed 9/1/06 Francesca C. v. Superior Court CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FRANCESCA C.,	G037248
Petitioner,	(Super. Ct. No. 05CC08620)
v.	O P I N I O N
THE SUPERIOR COURT OF ORANGE COUNTY,	
Respondent;	
LUTHERAN HIGH SCHOOL ASSOCIATION OF ORANGE COUNTY,	
Real Party in Interest.	

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, John M. Watson, Judge. Petition granted.

Marlin & Saltzman, Louis M. Marlin and Lynn P. Whitlock for Petitioner.

No appearance for Respondent.

McKay, Byrne & Graham, John P. McKay, Michael P. Acain and Kathryn C. Marshall for Real Party in Interest.

* * *

THE COURT:[*]

We issue a peremptory writ because real party in interest has failed to establish specific facts to allow questioning into her sexual practices during a court-ordered independent mental examination of petitioner. (Code Civ. Proc., § 2017.220.)[1]

I

Petitioner (plaintiff) has sued real party in interest (School) for negligence, negligent failure to protect and breach of contract. A teacher picked up plaintiff, then 16½ years old, late at night and drove her to the school, where they engaged in sexual relations. After the teacher's arrest, plaintiff "was treated by the school as the perpetrator, rather than the victim of the crime." Plaintiff says she was harassed and abused by other students, who taunted and called her obscene names, as "[s]igns were posted around the school supporting [the teacher.]" The teacher ultimately pled guilty to statutory rape.

Plaintiff, who is now nearly 21, seeks damages for serious emotional distress, including anxiety, depression, fatigue, guilt, headaches, loss of sleep, ulcers and suicidal thoughts.

Based on her emotional distress damage claims, School demanded that plaintiff appear for an independent medical examination (IME) before psychiatrist Shirah Vollmer and clinical psychologist Roberta Lynne Falke. School filed a motion pursuant to section 2017.220 "to answer queries into her sexual history relevant to the subject matter of plaintiff's allegations in the instant case." School sought to determine whether plaintiff's emotional injury resulted from other causes, including a prior incident where she allegedly was "exposed to ridicule, derision and embarrassment by disclosure of her sexual practices [with a boyfriend] to her [fellow students] . . . ."

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[*] Before Sills, P. J., Rylaarsdam, J., and Ikola, J.

[1] All statutory references are to the Code of Civil Procedure unless otherwise indicated.

School provided declarations from both mental health professionals regarding the general need and relevance of inquiring into an examinee's prior sexual and relationship histories as part of the ten topic areas contained in the American Psychiatric Association Guidelines. School offered to stipulate that any evidence regarding plaintiff's prior sexual history discovered during the IME be placed under seal for the court to decide at a hearing pursuant to Evidence Code section 402.

Plaintiff herself moved for a protective order regarding the IME. Plaintiff's counsel sought to limit the IME to "present or past symptoms relating to the injuries which are the subject of this action, and issues relevant to this lawsuit. *Plaintiff will not be asked any questions with respect to her sexual and/or dating and/or romantic history or practices,* either before or after the incident involving [Teacher]." (Original italics.) Plaintiff contended that the IME should not be permitted to inquire into any other potential emotional stressors in her life, including her mother's medical condition, and her family's "alleged dysfunction." Plaintiff stressed that "she has not put her sexual relationships at issue either after the incident or before."

Following a hearing, the court denied plaintiff's motion for a protective order, finding that good cause had been shown under section 2017.220. The court instructed Vollmer and Falke to conduct the IME in accordance with "applicable professional standard[s] . . . ."

Plaintiff promptly filed a petition for writ of mandate. We granted a temporary stay of the IME, requested informal briefing, and issued a *Palma* notice. *(Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180.) Both School and plaintiff filed briefs in response to the *Palma* notice.

II

Section 2017.220 provides that in a sexual harassment or similar civil sexual misconduct suit, any party seeking to discover the plaintiff's sexual history with

any person other than the alleged perpetrator must establish specific facts showing good cause, relevancy, and the likelihood that discovery will lead to admissible evidence.[2]

School's primary argument is that section 2017.220 "does not apply to the current controversy" because plaintiff "has not raised causes of action for either sexual harassment, assault or battery, which are the specific claims addressed by this statute."

The statutory language belies this contention. The statute does not simply state that it applies to causes of action for sexual harassment, sexual assault or sexual battery. Instead, section 2017.220 goes further to apply to "any civil action alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery . . . ."

School relies on *Patricia C. v. Mark D.* (1993) 12 Cal.App.4th 1211 (*Patricia C.*), which recognized a trial court's discretion to admit evidence of a patient's sexual history in her medical malpractice action against a psychologist with whom she had sex during counseling sessions. The evidence was admitted on the issue of proximate cause of the patient's emotional distress, notwithstanding an absolute bar to the introduction of such evidence in Evidence Code section 1106 for "any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery." *Patricia C.* adopted a narrow construction of this language, holding that it was not intended to apply to every case, "regardless of the causes of action alleged, where the defendant's purported conduct *may be characterized* as sexual harassment, assault or

[2] Here's the text of the statute: "In any civil action alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, any party seeking discovery concerning the plaintiff's sexual conduct with individuals other than the alleged perpetrator shall establish specific facts showing that there is good cause for that discovery, and that the matter sought to be discovered is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence. This showing shall be made by a noticed motion, accompanied by a meet and confer declaration under Section 2016.040, and shall not be made or considered by the court at an ex parte hearing."

battery." (*Patricia C., supra,* 12 Cal.App.4th at p. 1216, original italics.) School urges that we do the same.

Patricia C. is distinguishable. As plaintiff points out, the court interpreted the statute to avoid a conflict with another, more specific statute (Civ. Code § 43.93) specifically pertaining to the discretionary admission of evidence of a patient's sexual history in actions alleging psychologist-patient sexual contact. "If section 1106 is construed broadly to reach beyond causes of action for sexual harassment, assault or battery, so that it may apply to causes of action for psychotherapist-patient sexual contact, there would be an irreconcilable conflict between the two statutes." (*Patricia C., supra,* 12 Cal.App.4th at p. 1217.) The court further noted the likelihood of emotional disorders "that predated the sexual contact and led to psychotherapy in the first place." (*Id.* at p. 1218.)

More on point is the decision in *Barrenda L. v. Superior Court* (1998) 65 Cal.App.4th 794. In *Barrenda L.*, a county was sued for *negligence* when the plaintiff, who was in foster care, was repeatedly raped by the foster mother's adult son beginning when she was 11 and continuing until she was 14, and resulting in three pregnancies, two of which were aborted. The county had successfully moved to compel an IME of the plaintiff by a staff university psychiatrist, which would include questions regarding prior and subsequent sexual encounters with other men. The county's supporting declaration stated, "An [independent psychological examination] is the only available means for discovering issues directly relevant to causation and damages. Further, without an [independent psychological examination], the County will be put at a serious and unfair disadvantage in defending claims which [petitioners] have brought." *Barrenda L.* issued a writ to preclude questioning of other sexual conduct, finding that the county had failed to carry its burden of proof "to produce specific factual evidence to demonstrate that emotional distress resulting from this other sexual activity, if any, was *directly related* to injuries claimed in this litigation." (*Id.* at p. 802.)

III

School's showing of good cause is insufficient. It is true that School offered two declarations by medical health professionals, Vollmer and Falke. However, they are not case-specific, but only point out that "standard" testing protocols include sexual history as "an important tool in understanding personality development . . . ."[3]

This is not enough. In the leading case, *Vinson v. Superior Court* (1987) 43 Cal.3d 833, our Supreme Court stated, "Nowhere do defendants establish specific facts justifying inquiry into plaintiff's zone of sexual privacy or show how such discovery would be relevant. Rather they make only the most sweeping assertions regarding the need for wide latitude in the examination. Because good cause has not been shown, discovery into this area of plaintiff's life must be denied." (*Id.* at pp. 843-844.)

IV

We grant the petition for writ of mandate only insofar as it concerns School's failure to establish good cause under section 2017.220 for inquiries into plaintiff's sexual history with others. Plaintiff has not established that the trial court abused its discretion in denying her broader motion for a protective order to severely limit the scope of the questions that can be asked during the IME beyond the good faith standards set forth in the statutes governing IME's. (See § 2032.320; *Vinson v. Superior*

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[3] Vollmer declared, "Obtaining background family and social history, background employment and educational history and background childhood and sexual history is essential in obtaining a psychological understanding of any patient. To demand that an examining psychiatrist not complete this part of the examination is like demanding that an internist not physically examine a patient below the neck." And again, "Plaintiff's sexual behavior and history are at the heart of the allegations of what injured her. The context in which the incident with [the teacher] is placed within plaintiff's own experiences and perceptions is critical to determining the extent to which she is damaged by it. I cannot begin to assess the reasonableness of plaintiff's claims without being allowed to ask her questions relating to her life experiences and putting them in the context of the incident that is the subject of this legal action." Falke filed a declaration with nearly identically worded assertions.

Court, supra, 43 Cal.3d 833.) Plaintiff's counsel has specifically stated that plaintiff "shall not be questioned by the examiner, or any representative of the examiner about anything other than present or past symptoms relating to the injuries which are the subject of this action, and issues relevant to this lawsuit."

These proposed restrictions are unduly broad. Under *Vinson,* the mental health examiners are entitled to inquire, subject to applicable professional standards, into plaintiff's background family and social history as part of their analysis of alternative sources of plaintiff's claimed emotional distress. "[P]laintiff cannot be allowed to make her very serious allegations without affording defendants an opportunity to put their truth to the test." (*Vinson v. Superior Court, supra,* 43 Cal.3d at p. 842.) As School correctly points out, "[t]he highly restrictive guidelines imposed by [section] 2017.220 apply only to inquiries into an examinee's sexual history. All other areas of inquiry at an IME, and even the propriety of the IME itself are governed by the good faith standard of [section] 2032.320."

Because the relevant facts are not in dispute and the law is well-settled, a peremptory writ in the first instance is proper, and we have so informed the parties, who have filed no objection. (§ 1008; *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1259-1260.)

Let a peremptory writ of mandate issue directing respondent court to vacate its orders of June 22, 2006, and to enter a new and different order granting plaintiff's motion for a protective order insofar as it seeks to preclude discovery into plaintiff's sexual history with any person other than the alleged perpetrator. (§ 2017.220.) The writ of mandate is denied insofar as plaintiff seeks to impose additional restrictions upon the statutorily permissible scope of the IME. (§ 2032.320.)

No costs are awarded for this interim proceeding, but may be allowed to the party ultimately prevailing in the discretion of the superior court. The temporary stay is lifted upon the finality of this opinion.